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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, et al,
Plaintiffs-Appellants,

v.

DETROIT BOARD OF EDUCATION, DETROIT FEDERATION OF TEACHERS et al.,
Defendants-Appellees

CHRISTINE WARCZAK, et al.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF DETROIT, DETROIT FEDERATION OF TEACHERS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

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Appellees Board of Education of the City of Detroit and Detroit Federation of Teachers, et al., move, pursuant to Rule 16 of the Rules of the Supreme Court, that the appeal herein be dismissed, or in the alternative that the judgment below be affirmed, on the ground that the appeal presents no substantial federal question.

COUNTER-STATEMENT OF QUESTIONS PRESENTED BY THE APPEAL

1. Does a state statute which permits a public employer such as the Detroit Board of Education to enter into a collective bargaining agreement with a union of the city's teachers requiring as a condition of employment that all employees in the bargaining unit pay the union a service fee equivalent to dues, violate the First and Fourteenth Amendments of the United States Constitution?

2. In upholding a constitutional right against compelled support of union expenditures for political causes, including a remedy of personal proportional refunds, did the Michigan Court of Appeals err in holding that teachers must specifically protest to the union the alleged political expenditures to which they object as a condition of obtaining restitution?

Since both questions must be answered in the negative under settled precedents of this Court, this appeal should be dismissed for want of a substantial federal question or the judgment below summarily affirmed.

ARGUMENT

1. Appellants first assert that a state statute authorizing a public employer and a union of public employees to enter into a collective bargaining agreement to require all members of the bargaining unit to pay a service fee to the union equivalent to dues violates the First and Fourteenth Amendments. But this claim cannot stand in the face of *Railway Employees Dept.* v. *Hanson,* 351 U.S. 225 (1956); indeed, the decision below follows *a fortiori* from *Hanson.*

This Court held in *Hanson* "that the requirement for financial support of the collective-bargaining agency by all who received the benefits of its work is within the power

of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments" (at p. 238). Certainly the authority of a state to set terms and conditions of employment for *its* employees is greater than the authority of Congress to regulate the employment conditions of private employees; this is especially true where, as in the Railway Labor Act upheld in *Hanson,* Congress overruled a state policy against any form of dues or service fee requirements. The policy judgment of the Michigan Legislature that those in public employ who benefit from representation by a collective-bargaining agent should pay therefor, is entitled to at least the respect accorded the Congressional judgment concerning the railway industry sustained in *Hanson.* "[T]he question is one of policy with which the judiciary has no concern" (351 U.S. at 234). While appellants would distinguish *Hanson* on the ground that this case involves the "fundamental freedoms of *public* employees" (Jurisdictional Statement, p. 17, emphasis in original), if anything, there may be fewer constitutional limitations on government when it acts in the capacity of employer, than in other contexts. See, e.g., *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968); *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 564 (1973). Furthermore, although *Hanson* involved the private sector, this Court there presupposed that "governmental action" was involved as the predicate for its reaching and rejecting the First Amendment contentions similarly urged in that case. 351 U.S. 225, 232.

Appellants' only argument against *Hanson's* applicability to the case at bar seems to be: "Public sector unions such as the Federation are involved in a 'collective bargaining' process inextricably connected to the formulation of

governmental policy regarding the provision of public services, budgeting, and taxation—political activity by any reasonable definition of the term" (Jurisdictional Statement, p. 16). But, from the point of view of the union and the employees it represents, collective bargaining remains the process by which the union seeks improved wages and working conditions for the benefit of all employees in the bargaining unit. Far from being "political," that process is a close approximation of the collective-bargaining system as it operates in the private sector. To put it another way, the process of settling employment conditions through collective bargaining is not transmuted from economic into "political" activity merely because the employer is a public body rather than a private party. The budgetary and tax consequences of an agreement between a union and a public employer are not constitutionally distinguishable from the consequences of an agreement reached between a union and a private employer whose customers include governmental bodies, and the bargaining situation before the Michigan Court of Appeals is indistinguishable from that in *Hanson*.

2. Equally lacking in substance is appellants' attack on the ruling below on the protesters' right to recover that part of their fees which might be expended for political causes.[1] Strangely, appellants would treat the ruling below as a rejection of the dissenters' rights with respect to political expenditures, whereas in fact the ruling below *squarely upholds those rights*. Thus, the Court of Appeals' opinion makes clear (Jurisdictional Statement, pp. 18a-21a) that—because the Michigan statute did not provide for the political expenditures exception which this Court's

[1] As we show below (n. 4), appellants in fact have never paid any agency fees.

decision in *Machinists* v. *Street*, 367 U.S. 740 (1961), found implicit in the Railway Labor Act—the statute "could violate plaintiffs' First and Fourteenth Amendment rights" (19a). To avoid such violation, the Michigan Court goes on to discuss the alternative remedies suggested in the *Street* opinion, and states its approval of "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed" (21a). The right to such restitution is upheld by the Michigan Court in the following explicit terms:

> "To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection."[2] (21a).

[2] Appellants argue that the Michigan statute, even as above construed to assure that objecting public employees need not support political activities with which they disagree, is unconstitutionally overbroad (Jurisdictional Statement, pp. 24-27). But this contention is nothing more than a reformulation of the freedom of association argument advanced and rejected in *Hanson*. The point established by *Hanson*, *Machinists* v. *Street*, 367 U.S. 740 (1961), and *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963), is that a statute which provides for required dues or fees payments is constitutional so long as employees who give proper notice of their objection are personally relieved of the obligation to finance political activities with which they disagree; but that they are not entitled to interfere with dues or fees obligations, or with expenditures, generally. That is exactly how the Michigan courts have interpreted the Michigan statute and the construction of that statute by the state courts is dispositive. "We accept without question [the state court's] view of the statute's meaning, as of course we must. [The] authoritative interpretation by the [State] Supreme Court 'puts these words in the statute as definitely as if it had been so amended by the legislature.'" *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 285 (1961).

Thus the Michigan courts have fully vindicated the right of public employees to restitution of the political expenditures to which appropriate objection is made, and this is all appellants can ask. Certainly, their belated effort to challenge the ruling of the court below that an employee must make his objection known to the union before he can obtain judicial restitution raises no substantial federal question or indeed any federal question whatever.[3] While this Court in *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963), treated the judicial complaint as an adequate protest in federal statutory litigation (373 U.S. at 119, notes 5 and 6), it nowhere gave any intimation that state courts could not require protests directly to the union as a prerequisite to invocation of their judicial machinery or that it in any way intended to cast doubt upon "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethelehem Shipbuilding Corporation*, 303 U.S. 41, 50-51 (1938). Appellants, like other state court litigants, must pursue their remedies in the manner that state law prescribes for the vindication of their rights and no federal question is raised in the absence of such pursuit. See, e.g., *Mellon Co.* v. *McCafferty*, 239 U.S. 134 (1915); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Copperweld Steel Co.* v. *Industrial Commission*, 324 U.S. 780 (1945); *Woods* v. *Nierstheimer*, 328 U.S. 211 (1946); *Edelman* v. *California*, 344 U.S. 357 (1953); *Brown* v. *Allen*, 344 U.S. 443 (1953). Furthermore, there can be no damage to appellants in

[3] Actually, appellants' complaints did not seek restitution of the amounts allegedly spent by the union for political causes as provided by *Street* and *Allen*, but rather sought to avoid their entire fees obligation in direct contradiction of this Court's ruling in *Hanson*.

following the state procedure of making known to the union the political causes to which they object; as to appellants, the collective bargaining agreement is not yet in force and the union has collected no service fees from appellants.[4] The record is barren of any suggestion that once service fee payments do commence, the union would not make full restitution, in accordance with the decision below, to the appellants of any funds expended for such causes.

[4] Appellants' complaint was filed before any collective bargaining contract containing an agency shop clause went into effect. Subsequently, appellants—or, more accurately, the very few of them still remaining who have not long since voluntarily become members of the appellee Federation—avoided paying any agency shop fees by virtue of a contract clause, still honored by appellee Board, which stayed their obligation to do so pending litigation.

Furthermore, the record is devoid of any alleged objectionable expenditures by appellee union, these cases having been decided on motions for summary relief below. In that regard, appellants' "offer of proof," mentioned at pp. 7-8, n. 2, of their Jurisdictional Statement, was properly rejected by the trial court under local practice and is not part of the record here, *Chatham Supermarkets, Inc.* v. *Ajax Asphalt Paving, Inc.*, 370 Mich. 334, 341, 121 NW2d 836 (1963); *Drouillard* v. *City of Roseville*, 9 Mich. App. 239, 244, 156 NW2d 628 (1967).

CONCLUSION

Since the Michigan Court of Appeals has followed this Court's decision in *Hanson* and has provided a remedy of restitution of political expenditures in line with *Street* and *Allen*, it is respectfully submitted that the appeal should be dismissed for want of a substantial federal question or the judgment below summarily affirmed.

Respectfully submitted,
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